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No. 81-55

In The

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

PAUL IRA FERBER,
Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state statute which abridges the public's First Amendment right to view films and other visual portrayals of *non-obscene* adolescent sexual conduct can be upheld.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent PAUL IRA FERBER prays that a writ of certiorari to review the judgment of the New York Court of Appeals, entered on May 12, 1981, be denied.

Opinion Below

The opinion of the Court of Appeals, dated May 12, 1981 is printed in the Appendix to the Petition at pages 1a-16a and is reported (52 N.Y.2d 674 [1981]).

Jurisdiction

Respondent Paul Ferber was found guilty in the New York Supreme Court of two counts of promoting a sexual performance by a child in violation of New York Penal Law § 263.15. On January 31, 1979 respondent was sentenced to 45 days in prison and a conditional discharge on each count, the sentences to run concurrently.

On February 28, 1980 the Appellate Division, First Judicial Department affirmed the conviction without opinion (74 A.D.2d 558, 424 N.Y.S.2d 967). On May 12, 1981 the New York Court of Appeals reversed the conviction and dismissed the indictment, holding the statute unconstitutional because it "would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment" (52 N.Y.2d at 678).

A petition for a writ of certiorari was served upon respondent on July 13, 1981. The jurisdiction of this Court was invoked under 28 U.S.C. §1257(3). This brief in opposition to the petition is filed within sixty days of that service, an extension of time having been granted by the Clerk of the Court.

Constitutional Provisions and Statutes Involved

The text of the First Amendment and section one of the Fourteenth Amendment to the United States Constitution are set forth in Appendix A of this brief, along with New York Penal Law §§ 263.05, 263.10 and 263.15.

Statement of the Case

On March 2, 1978 an undercover police officer, posing as an out-of-town salesman, and a "collector" of "kiddie porn", purchased two films involving children from respondent Paul Ferber at the Madison Square Book Shop located at 488 Eighth Avenue, in Manhattan. One week later, respondent was arrested and his store searched. Subsequently, he was indicted and tried for violating New York Penal Law §§ 263.10 (promoting an *obscene* sexual performance by a child) and 263.15 (promoting a sexual performance by a child).

Respondent argued that Penal Law § 263.15 was unconstitutional because protected First Amendment speech came within its clutches. The Honorable Irving Lang ruled on October 24, 1978 that there was "no constitutional impediment to this legislation" (*People v. Ferber*, 96 Misc.2d 669, 409 N.Y.S.2d 632, 637 [Sup. Ct. 1978]).

Upon the denial of the motion to dismiss, respondent proceeded to trial. The jury, after two days of deliberation, found respondent guilty of violating Penal Law § *263.15* but acquitted him on the counts charging violations of § 263.10 (promoting an *obscene* sexual performance by a child).

On January 31, 1979, the trial court sentenced Paul Ferber to 45 days in prison and a conditional discharge on count three of the indictment, the same sentence to run concurrently on count four.

On February 28, 1980, the Appellate Division, First Judicial Department of the Supreme Court of the State of New York affirmed respondent's conviction without opinion (74 A.D.2d 558, 424 N.Y.S.2d 967 [1st Dept. 1980]).

New York Court of Appeals Decision

The conviction was reversed and the indictment dismissed on May 12, 1981 when the Court of Appeals held that:

> "[T]he statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content, and since no justification has been shown for the distinction other than special legislative distaste for this type of portrayal, the statute cannot be sustained . . ." (52 N.Y.2d at 681).

Relying upon the fundamental tenet that "First Amendment standards remain applicable whenever the effect of a government regulation is to curtail protected modes of expression . . ." (*Id.* at 679), the Court of Appeals rejected the state's justification for the unconstitutional legislation (protecting the health and well-being of children). Furthermore, in concluding that the statute was "strikingly underinclusive", the court noted that:

> "Section 263.15 does not prohibit the knowing sale or promotion of any film, or other item, in which a child has performed a dangerous stunt or where production required a child to engage in any of the numerous activities in which the Legislature in the exercise of its police power has determined is dangerous to the health or well-being of child employees . . ." (*Id.* at 680).

Finally, in answer to the anticipated outcry from certain public groups and the erroneous claims of the dissenting judges below, the Court of Appeals concluded that:

> "[I]t is important to emphasize that the statute considered in this case (Penal Law § 263.15) does not deal with child pornography. Those who employ children in obscene plays, films and books, are still subject to prosecution as are those who sell or promote such materials (see Penal Law, §§ 263.05; 263.10). We merely hold that those who present plays, films, and books portraying adolescents cannot be singled out for punish-

ment, simply because they deal with adolescent sex in a realistic but nonobscene manner" (*Id.* at 681).

Thus, in a few words, this is what this case is all about.

REASONS FOR DENYING THE WRIT

I

The New York penal law which attempts to regulate visual material dealing with young people engaged in various forms of sexual activity, without including the requirement that the sexual performance be legally obscene, is unconstitutional as it encompasses protected speech within its ambit, as correctly held by the New York Court of Appeals.

The controversy over New York's patently unconstitutional child pornography statute, which makes criminal the promotion of visual portrayals of adolescent sex even when the performance is protected by the First Amendment, has become complicated by the hysteria surrounding the public's concern over the exploitation of children. When a legal question becomes so completely hostage to fear, the capacity to analyze it is lost and contention absorbs all our intellectual energy. Fortunately, New York's highest court was able to ignore the frenzy and follow an unbroken series of cases extending over a long stretch of this Court's history that hold statutes regulating what the public may read or see must contain the constitutional requirement that the performance be legally obscene. Moreover, an analysis of Penal Law § 263.15 confirms that by striking down this patently unconstitutional legislation, New York has lost none of the protections of innocent children from the supposed harm attendant their participation in the making of sexual films and photographs.

Legislative History

In November, 1977, the New York legislature launched a major offensive against the exploitation of young people in sexual films. The attack was spearheaded by three new sections of the Penal Law — §§ 263.05, 263.10, and 263.15.

Section 263.05 makes it a class C felony for a person to *use* a child in a sexual performance. This statute stops people from actually using children in the production of sexual photographs and motion pictures.

The second provision, Penal Law § 263.10, makes it a class D felony for a person to promote an *obscene* sexual performance by a child. This law requires that the sexual performance be *legally obscene*, in accordance with a long line of cases decided in this Court interpreting the First Amendment.

The third section, *263.15*,* which the New York Court of Appeals found to prohibit the promotion of materials which are traditionally entitled to constitutional protection under the First Amendment, makes it a class D felony for a person to merely promote a sexual performance of a child. Section *263.15* eliminates entirely the constitutional requirement that the sexual performance be legally obscene. Thus, this misdirected law was destined to ultimately meet with destruction sooner or later. Fortunately, the New York Court of Appeals had the courage to take the necessary action.

As demonstrated by the chart on the following page, §§ 263.10 and *263.15* are virtually identical. The only difference between the two provisions is that § 263.10 requires that the performance be *legally obscene*, while that essential element is conspicuously missing from § *263.15*. Obviously, the legislature in creating § 263.10 anticipated the risk that § *263.15* would be

*To avoid confusion, the unconstitutional provision (§ 263.15) always appears in italics throughout this brief.

263.10—PROMOTING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD

A PERSON IS GUILTY OF PROMOTING AN *OBSCENE* SEXUAL PERFORMANCE BY A CHILD WHEN, KNOWING THE CHARACTER AND CONTENT THEREOF, HE PRODUCES, DIRECTS OR PROMOTES ANY *OBSCENE* PERFORMANCE WHICH INCLUDES SEXUAL CONDUCT BY A CHILD LESS THAN SIXTEEN YEARS OF AGE.
(CLASS D FELONY)

263.15—PROMOTING A SEXUAL PERFORMANCE BY A CHILD

A PERSON IS GUILTY OF PROMOTING A SEXUAL PERFORMANCE BY A CHILD WHEN, KNOWING THE CHARACTER AND CONTENT THEREOF, HE PRODUCES, DIRECTS OR PROMOTES ANY PERFORMANCE WHICH INCLUDES SEXUAL CONDUCT BY A CHILD LESS THAN SIXTEEN YEARS OF AGE.
(CLASS D FELONY)

invalidated. This conclusion is inescapable because § *263.15*, if constitutional, covers every form of youthful sexual activity contemplated by § 263.10. In other words, since § *263.15* covers every type of sexual performance by a child, regardless of whether or not it is obscene, there is no need for § 263.10. The prophylactic purpose of this statutory scheme is well served by §§ 263.05 and 263.10. There is no need for § *263.15* for there is in existence an adequate arsenal to sustain the legal war against child pornography.*

The individuals who are responsible for the potential danger to a child's welfare are the photographer, cameraman, producer, director, and writer of the work — in other words, those who actually *use* the child in the sexual performance. These very acts, which are the direct cause of any harm to the child, are already expressly prohibited by Penal Law § 263.05, which subjects those who "employ, authorize, or induce a child less than sixteen years of age to engage in a sexual performance" to conviction and imprisonment up to 15 years. The root of the problem lies in the making of these pictures. Obviously, the legislature recognized this was the primary evil, for the law.naking body designated the use of a child in a sexual performance as a class C felony. The qualitatively different and much removed conduct of promoting an obscene sexual per-

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*In declaring overbroad the Texas statute making it a felony for a person commercially to possess, exhibit, distribute or sell any motion picture or photograph showing a person younger than 17 years of age observing or engaging in sexual conduct, the court in *Graham v. Hill*, 444 F.Supp. 584 (W.D. Tex. 1978), emphasized:

> "[T]his holding does not leave Texas without a means of dealing with the problem of child pornography, quite apart from enforcement of [the invalidated section]. Other of the state's criminal obscenity statutes are addressed to the exploitation of minors in the creation of pornographic materials, and the state has the authority under those laws to prosecute persons who actually use minors in the production or dissemination of obscene materials or performances" (444 F.Supp. at 594).

formance by a child, such as the selling of a magazine containing such depictions, received only a D felony classification. Even the patently unconstitutional § *263.15* was accorded D felony status. Had the lawmakers found that the mere dissemination of materials with pictures of youthful sexual activity created as great a risk of harm to the children used to make the pictures, then surely the legislature would have denominated §§ 263.10 and *263.15* as well as § 263.05, C felonies.* Thus, petitioner's attempt to justify § *263.15* as necessary to protect children from sexual abuse and psychological harm arising from the activities of certain filmmakers and photographers must fail.

The unexamined assumption that by eliminating sources of distribution, those who make films of children engaged in sex will be discouraged, is a dangerous doctrine. When newspapers and magazines publicize the large ransoms obtained by hijackers, terrorists, and kidnappers, others are inevitably encouraged to attempt similar crimes. But it would be unthinkable to make it a felony for any person to sell a newspaper or magazine that contained reports of this kind. The making of bombs is illegal but not the sale of a book with instructions of how to make explosives. It is unlawful to make or sell untaxed whiskey and cigarettes but it is not a crime to buy those products. There are many instances in the criminal law where statutes are passed that prevent the creation of a direct harm to individuals but go no further for good reason. The objective of these new laws ought to be the protection of children from sexual corruption and not the viewing of pictures of them which harm no one. As the court below correctly held, § *263.15* imposes significant burdens on free speech with little or no

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*See *People v. Folk*, July 10, 1981 *New York Law Journal* (Sup. Ct. N.Y. Co.), where defendant's plea of guilty to attempted use of a child in a sexual performance (Penal Law §§ 110.00, 263.05) was upheld in the wake of the New York Court of Appeals decision holding §263.15 unconstitutional.

assurance of any additional safeguards for children other than those already provided by §§ 263.05 and 263.10.

Arnold D. Hechtman, a leading authority on statutory construction in New York, who wrote the Practice Commentary for *§ 263.15*, expressed his misgivings over this impaired law by declaring:

> "It may thus be argued that § 263.10 is unnecessary since the conduct defined therein already falls within the broader scope of § 263.15.
>
> "It is precisely this broad reach of § 263.15 that renders it of questionable validity. It appears to encompass, for example, an unobscene play or motion picture of genuine artistic merit which happens to include one fleeting scene where a child simulates masturbation. It could also apply to a person who gives someone a gift ('promotes') of a fine book which contains one photograph ('performance') depicting innocent 'sexual conduct' by a child. Concededly, these examples are somewhat extreme and it is to be hoped that law enforcement authorities would not make arrests or conduct prosecutions in these and similarly innocuous situations. However, since the language of the statute clearly reaches such conduct, its validity is, at least, suspect" (McKinney's Consolidated Laws, Penal Law § 263.15, Vol. 39, at 434, 435).*

A study of the legislative history of this statute, including an investigation of the written comments contained in the legislative jacket, shows that scholars, journalists, and other interested citizens have cited long lists of abuses that could come from this overly harsh statute.**

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*Ironically, even Judge Irving Lang, who first ruled on the propriety of *§ 263.15*, displayed his doubts over this statute by stating:

> "This section [263.15] poses greater constitutional problems for the section prohibits sexual conduct by a child, even if the performance is within a constitutionally protected context" (*People v. Ferber*, 96 Misc.2d 669, 409 N.Y.S.2d 632, 637 [Sup. Ct., N.Y. Co. 1978]).

**McKinney's Session Laws of 1977, ch. 910, § 1.

Similar Statutes Held Unconstitutional

The list of states which have enacted child pornography laws has grown dramatically within the last two years to include almost all of the states. Nearly half of the state provisions — 22 laws — as well as the federal statute, have retained the constitutional component requiring that the proscribed sexual performance be legally obscene.* What may be called the more enlightened states, such as California, Connecticut, Illinois, Michigan, Minnesota, and Ohio have all included the obscenity term. Moreover, even some of the most conservative states such as Alabama, Florida, Missouri, North Carolina, South Carolina, Tennessee, and Virginia have shied away from the perilous approach of eliminating the obscenity requirement.

Our investigation reveals that none of the remaining newly enacted provisions which fail to contain this essential constitutional ingredient has been judicially approved by the state's highest court.** Furthermore, not only has New York's statute been struck down, the Texas law (9 § 43.25) was declared unconstitutional in *Graham v. Hill*, 444 F.Supp. 584 (W.D. Tex. 1978).*** There still exists the possibility, however, that

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*18 U.S.C. § 2252; Ala. § 13-7-230 *et seq.*; Cal. Labor Code § 1309.5; Conn. §§ 53a-193, 53a-196b; Fla. § 847.014; Ga. § 54-9903; Idaho §§ 18-1517A, 18-4101-03; Ill. 38 § 11-20a; Ind. § 30-11.1; Md. § 419A; Mich. § 750.145c; Minn. § 617.246; Mo. § 568.060; Neb. § 28-1463; N.H. § 650:2; N.C. § 14-190.6; N.D. § 12.1-27.1-02, 03; Ohio § 2907.321; Ore. § 163.477; S.C. § 16-15-380; S.D. 22-22-24, 22-22-25; Tenn. § 39-1019; Va. 18.2-374.1.

**Significantly, some of the statutes which lack an obscenity requirement merely criminalize the use of children in the *production* of sexual performances, as opposed to the *dissemination* of materials depicting sexual performances by children. *See, e.g.*, Alas. § 11.41.455; Iowa § 728.12; Nev. § 200.509; N.M. § 30-6-1; Utah § 76-10-1206.5.

***The New York law was first found unconstitutional by Hon. Robert Ward in *St. Martin's Press, Inc. et al. v. Carey et al.*, 440 F.Supp. 1196 (S.D.N.Y. 1977), but the Second Circuit reversed that judgment and dismissed the complaint on the grounds there was no "case or controversy" (605 F.2d 41 [2d Cir. 1979]).

the 19 statutes with no obscenity requirement, cited by petitioner, may yet be upheld by the highest courts of their respective states. Thus, we respectfully suggest that the granting of the petition would ultimately require the affirmance of the New York Court of Appeals decision and similarly render unconstitutional these 19 state laws, which may yet be upheld *in their own states*. For this reason alone, the petition should be denied.

Moreover, the law is well settled that a state may afford a defendant greater rights than those held to be necessary by this Court. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967). In its decision the New York Court of Appeals has accorded the First Amendment the deference to which it is entitled. Even if that level of protection exceeds that which this Court would have found necessary, New York's decision may nevertheless stand for it does not in any way infringe upon federal constitutional rights — indeed, it expands upon them in a way which must be respected.

The Statute's Overreach

Without the "obscenity" control factor, *§ 263.15* is clearly overbroad for it outlaws any production dealing with adolescent sex, whether it be a play, a motion picture or scientific text. Regardless of its literary, artistic, political or scientific value, it would come within the confines of this defective law. If a book contains a single picture or illustration of an adolescent engaged in simulated sex, it faces prosecution. For instance, a Broadway play showing the rape of a fifteen-year-old girl: a nudist magazine exhibiting a young person's genitals "lewdly displayed"; an illustrated book of sexual instruction for children, such as *Show Me*;* or a medical text with illustrations

*The book *Show Me*, winner of several literary awards, was the subject of the *St. Martin's Press* action previously described.

of a child masturbating, would all come under the shadow of this aberrant statute.

The films *The Exorcist* (Linda Blair masturbating); *Pretty Baby* (Brooke Shields engaged in simulated sex); *Luna* (Jill Clayburgh masturbating her son); as well as a number of other motion pictures, such as *Lolita* and *Taxi Driver*, could have been condemned under this bad law. A literal application of this unbridled legislation would endanger such works as sociological or anthropological documentary films or publications depicting "coming of age" rituals and treatises portraying children engaged in so-called "sexual conduct" as well as other culturally indispensible and acceptable forms of expression.*

There is presently a growing curiosity about prepubescent sex in the United States. Recently, the Department of Health, Education and Welfare launched a major investigation into the subject of incest. As incredible as it may seem, if the Government published an illustrated book dealing with this controversial subject, the author or distributor could be sent to prison, regardless of the work's scientific worth or literary value.

These are just a few examples of the apocalyptic impact this renegade statute will have upon films and books the adult population should have the right to read if they please. Section *263.15* looms upon the literary horizon as a constant threat to worthwhile productions dealing with the sexual conduct of young people which may be publicly acceptable.

The real terror of this statute's injunction lies not so much in what may be prosecuted and banished but what will inevitably be left unwritten. History has taught us that laws of this kind inhibit the production of films and books which may be useful to

*As the court below emphasized, "[the statute] applies equally to a live performance of a Broadway play and a filmed report of New Guinea fertility rites" (52 N.Y.2d at 680).

society. Their creation is stayed by the fear that the publisher or distributor may go to prison. This sad state of affairs cannot be tolerated in a free society.

Any legislative enactment which bans virtually all forms of sexual expression, especially that which is not legally obscene, is classically overbroad and unconstitutional. When a statute's facial overbreadth chills, and in fact condemns protected material, as well as places standardless discretion in the hands of local governmental functionaries, it cannot pass constitutional muster.* It would be hard to find a more classic example of overbreadth in a statute. No matter how *§ 263.15* is viewed or construed, it prohibits the distribution of all forms of expression of sexual conduct by a person under sixteen years of age *regardless:*

(1) whether it possesses literary, artistic or scientific value, or

(2) does not appeal to anyone's prurient interest, or

(3) is completely acceptable to the community.

Any statute which suppresses literature which is unquestionably protected by the First Amendment cannot be sustained. Therefore, *§ 263.15* was properly declared unconstitutional and the decision of New York's highest court need not be reviewed.

The Law of Obscenity

Under the First Amendment a state cannot ban all books or films dealing with adolescent sex. It can only proscribe those productions which are obscene, as that term has been defined by this Court. Thus, as recognized by the court below, *§ 263.15*,

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**Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Grayned v. Rockford*, 408 U.S. 104 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *United States v. Raines*, 362 U.S. 17 (1960).

which authorizes the condemnation of materials which are not legally obscene, represents an abrupt departure from this long tradition deeply woven into the fabric of the First Amendment.

For over twenty years this Court has held that only obscene matter falls outside the protection of the First Amendment. *Miller v. California*, 413 U.S. 15 (1973). Indeed, in *Miller*, this Court took great pains to emphasize the need for carefully-drawn legislation whenever a state seeks to restrict any form of expression and engineered the three-part constitutional test which must be fulfilled before any work may be deemed obscene, and therefore cast outside the precincts of the First Amendment. Statutes which stray from this strict constitutional requirement are void.*

**See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacrilegious"); *Gelling v. Texas*, 343 U.S. 960 (1952) ("prejudicial to the best interests of the people"); *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954) ("immoral" or "tend to corrupt morals"); *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955) ("approved . . . moral and proper [publications]"); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959) ("desirable, acceptable or proper"); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) ("portrayal of sexual promiscuity as 'profitable, desirable, acceptable, respectable, praise-worthy or commonly accepted' "); *Winters v. New York*, 333 U.S. 507 (1948) ("which tends to incite minors to violent or depraved or immoral acts"); *Rabeck v. New York*, 391 U.S. 462 (1968) ("magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical difference between the sexes"); *Radford v. Webb*, 446 F.Supp. 608 (W.D.N.C. 1978), *aff'd*, 596 F.2d 1205 (4th Cir. 1979) ("any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation"); *Hillsboro News Co. v. Tampa*, 451 F.Supp. 952 (M.D. Fla. 1978) ("offensive sexual materials"); *People v. Bookcase, Inc.*, 14 N.Y.2d 409, 252 N.Y.S.2d 433 (1964) ("any book . . . the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality"); *Calderon v. Buffalo*, 61 A.D.2d 323, 402 N.Y.S.2d 685 (4th Dept. 1978) ("any book . . . which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion . . .").

The *Miller* test has flourished because it strikes a reasonable accommodation between the state's interest in controlling obscene material and the public's right to choose what it will read or see. Therefore, no law is constitutional unless it contains this essential element.

The Laws Protecting Children

A voyage backward through the legal history of statutes designed to protect children reveals that laws similar to *§ 263.15* have never survived constitutional attack. In the same year the Court decided the *Roth** case it considered, for the first time, a law designed to protect children from obscene material. In *Butler v. Michigan*, 352 U.S. 380 (1957), the Court declared unconstitutional a statute which made the sale of books harmful to children illegal. Mr. Justice Frankfurter, in an incisive opinion, wrote:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children" (352 U.S. at 383).

The same statutory failings found in the *Butler* case are italicized by *§ 263.15*. It will eliminate from New York's literature and films *all* references to adolescent sex. This is not decorative rhetoric but involves genuine fears as documented in this brief. If this dangerous law is allowed to remain in the hands of prosecutors throughout New York, no serious film or illustrated book dealing with sexual conduct of young people will be safe.

Even the concept of "variable obscenity", with its aim of protection of children, does not forsake the constitutional requirement that obscenity be found before presumptively

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**Roth v. United States*, 354 U.S. 476 (1957).

protected materials can be suppressed. *Ginsberg v. New York*, 390 U.S. 629 (1968). Penal Law § *263.15* purports to regulate the type of material which may be consumed by *adults*. It is not designed to protect children from the prospect of unsavory publications falling into their hands. Penal Law §§ 235.20-235.22 already regulate that area and are an embodiment of the state's concern for its young citizens.

Nothing that was said in *Ginsberg v. New York* or that is inherent in the concept of "variable obscenity" indicates that the state legislatures may limit what adults read without including the essential requirement of obscenity. No matter how offensive the material in question may be, whether it be bestiality, necrophilia, or pedophilia, a free society should be permitted to decide for itself what is enjoyable or worthwhile so long as the material chosen is not legally obscene. The center of § *263.15* simply cannot hold under this weight of authority.

Since this Court first chartered this general course of law dealing with the subject of obscenity, it has never wandered from the formula requiring laws to include the requirement of obscenity. Thus, an analysis of these authorities leads to the inescapable conclusion that a state statute regulating what *adults* may read or see must contain the *obscenity* test. In other words, if it is not legally obscene, it should be available to the public. In this way the control of obsenity is left to the self-regulating forces of a society's taste, in the same fashion the investigation of all other controversial subjects is.

By declaring § *263.15* unconstitutional, society has not been left defenseless. Sections 263.10 and 263.05 are more than adequate to protect children from sexual exploitation. The loss of § *263.15* will in no way impair the prosecution of those who take unfair advantage of children in making sexual films. *See People v. Folk*, *supra*. It is simply not necessary to deprive New York's entire adult population of what may be worthwhile books or films, dealing with adolescent sex, when "no

justification has been shown for the distinction other than special legislative distaste for this type of portrayal . . ." (52 N.Y.2d at 681). The other formidable statutory weapons can effectively deal with this parochial evil.

For all these reasons the decision below holding § *263.15* unconstitutional is correct. History and logic are on our side and 22 states, as well as the federal government, stand with us. Accordingly, the petition for a writ of certiorari should be denied.

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